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No. 83-741

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH FALCONE, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a *pro se* litigant who is also an attorney, seeks attorney's fees under the Freedom of Information Act, 5 U.S.C. 552, as compensation for pursuing litigation under the FOIA.

1. Petitioner, a tax attorney, brought a *pro se* suit in the United States District Court for the Eastern District of Michigan under the FOIA, seeking to compel the Internal Revenue Service to produce certain documents. Petitioner obtained some of the documents he sought and then moved for attorney's fees under the FOIA (see 5 U.S.C. 552(a)(4)(E)). Pet. App. 1a-2a. The district court denied attorney's fees because it concluded that the IRS "did not act unreasonably in denying [petitioner's] request" for the documents (*id.* at 4a) and indeed "had reason to believe" that the documents petitioner sought "might be exempt" from disclosure under the FOIA (*id.* at 5a).

The court of appeals affirmed on the ground that 5 U.S.C. 552(a)(4)(E) does not authorize an award of attorney's fees to a *pro se* litigant. The court noted that in *Wolfel* v. *United States*, 711 F.2d 66 (1983), it had held that a *pro se* litigant who is not an attorney is not eligible for attorney's fees under the FOIA (Pet. App. 6a). The court ruled that there was no reason to treat petitioner differently merely because of the "fortuitous fact that [he] is also an attorney" (*id.* at 9a-10a). "[T]he same reasons which led us * * * to deny attorney's fees to *pro se* non-lawyer FOIA plaintiffs apply with equal validity to *pro se* attorney plaintiffs" (*id.* at 8a (footnote omitted)).

The court of appeals explained its first reason as follows (Pet. App. 8a (footnote and citations omitted)):

> The award of attorney's fees to successful FOIA plaintiffs was intended to relieve plaintiffs with legitimate claims of the burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government. Thus, we held in *Wolfel* that those claimants who chose to proceed without legal representation were not entitled to be compensated for legal costs which were never incurred. The same reasoning applies to *pro se* plaintiffs who are also attorneys since no legal costs are incurred in such cases. Since the plaintiff never assumed the burden which Congress intended to ease, an award of fees is inappropriate.

The court of appeals also noted that a principal purpose of the attorney's fee provision of the FOIA was to "encourage potential claimants to seek legal advice before commencing litigation" in order to "prevent unnecessary litigation" (Pet. App. 8a). The court reasoned that when an attorney represents himself he does not bring to the case the " 'detached and objective perspective' necessary to fulfill the aims of the Act" (*ibid.* (citation omitted)).

Finally, the court of appeals noted that allowing *pro se* plaintiffs to collect attorney's fees could create a "cottage industry" of litigants who use the attorney's fee provisions of the FOIA and similar statutes as a means of generating income. The court stated that "the fear that the United States could become an unwilling 'client' for inactive attorneys is not irrational" (Pet. App. 9a) and that Congress could not have intended such a result. The court also noted that attempting to calculate the "fees" of *pro se* litigants —including attorneys — on the basis of the value of the work they had allegedly forgone would present great practical problems (*ibid.*).

2. In *Barrett* v. *Bureau of Customs*, 651 F.2d 1087 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982) (No. 81-5633), this Court declined to consider a claim that the attorney's fee provision of the Privacy Act, 5 U.S.C. 552a(g)(3)(B), which is essentially identical to the attorney's fee provision of the FOIA, authorizes an award to a *pro se* litigant. Petitioner suggests no reason why the Court, having declined to review *Barrett*, should consider his claim. The question whether *pro se* litigants who are attorneys are eligible for fees is of significantly less practical importance than the issue presented in *Barrett*, since *Barrett* concerned the eligibility of all *pro se* litigants for fees. And as the court of appeals noted, all of the arguments against awarding attorney's fees to *pro se* litigants who are not lawyers apply equally to petitioner. There is no reason to believe that Congress intended to establish a special rule for *pro se* litigants who happen to be attorneys.[1]

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[1]Petitioner incorrectly asserts (Pet. 11) that the claimant in *Barrett* was a prisoner. The court of appeals' opinion reveals that Barrett was at one time an employee of the United States Customs Service (651 F.2d at 1088) but does not otherwise discuss her status. Indeed, the court of appeals' opinion does not deny that Barrett gave up other potentially gainful activities in order to pursue the Privacy Act litigation.

a. As we explained in our Brief in Opposition in *Barrett*,[2] both the language and the legislative history of attorney's fee provisions like that of the FOIA preclude the award of attorney's fees to *pro se* litigants. Nothing in the language or legislative history suggests that an exception should be created for *pro se* litigants who are attorneys.

All litigants, whether or not they are represented by attorneys, expend time and energy — often substantial amounts of both — in connection with the litigation in which they are involved. They may also aid their own cause by bringing to the litigation particular skills or abilities. But Congress did not intend to reimburse FOIA litigants for such expenditures of their own time, energy, and skill. Congress expressly limited awards to "reasonable attorney fees and other litigation costs reasonably *incurred*" (5 U.S.C. 552(a)(4)(E) (emphasis added)). *Pro se* litigants can recover out-of-pocket litigation costs under this provision, because those are "costs" that they actually "incurred." But they should not be able to claim attorney's fees, because they did not in any sense "incur" or pay such a "fee." "If attorney fees may be awarded to litigants regardless of whether those fees were actually incurred, the award becomes something of a cash bonus to a successful litigant as well as a financial penalty to the defendant government agency." *Cunningham* v. *FBI*, 664 F.2d 383, 385 (3d Cir. 1981) (footnote omitted).

Because petitioner "incurred" no attorney's fees, he is, under the "plain and unambiguous language" of the statute (*United States* v. *Rutherford*, 442 U.S. 544, 551 (1979)), ineligible for an award. The attorney's fee provision of the FOIA, like other waivers of sovereign immunity, creates liability only in those circumstances that are " 'unequivocally expressed' " (*United States* v. *Mitchell*, 445 U.S. 535,

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[2]We have sent a copy of that brief to petitioner.

538 (1980), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)), and its " 'limitations and conditions * * * must be strictly observed' " (*Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)). See also *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947).

The legislative history of the FOIA reinforces the conclusion that it is not intended to allow attorney's fees to *pro se* litigants. The FOIA attorney's fee provision was added not to compensate litigants for all the costs of litigation but to remove "barriers * * * insurmountable for the average person requesting information" (S. Rep. 93-854, 93d Cong., 2d Sess. 17 (1974)). The committees considering the provision noted that "[f]ew individuals can afford the expense of litigating a suit under the Freedom of Information Act" (H.R. Rep. 92-1419, 92d Cong., 2d Sess. 13 (1972)), because cases were likely to "involve[] legal expenses of over $1,000" (S. Rep. 93-854, at 18). As petitioner recognizes (Pet. 18), this legislative history reflects no intention to compensate *pro se* litigants. Moreover, Congress's concern with obstacles that effectively preclude litigation by all but the wealthy does not warrant such compensation because, as the Third Circuit has pointed out, the burdens of *pro se* litigation are seldom prohibitive: "[T]he difficulty and effort involved in proceeding *pro se* * * * cannot be said * * * [to] entail[] the same financial liabilities as those borne by one who retains an attorney and becomes indebted for substantial sums of money." *Cunningham*, 664 F.2d at 386.

An FOIA litigant who is an attorney, like any other litigant, can seek to retain another attorney as an alternative to representing himself. If his claim is meritorious, the attorney's fee provision of the FOIA increases the likelihood that he will be able to find another attorney willing to represent him. As the court of appeals noted, Congress wanted to encourage plaintiffs to retain attorneys because a

pro se litigant may lack "the objectivity and detachment that an outside attorney can provide" and that in turn helps prevent "groundless or unnecessary litigation" (see Pet. App. 3; *Cunningham*, 664 F.2d at 386; *Barrett*, 651 F.2d at 1089-1090; *White* v. *Arlen Realty & Development Corp.*, 614 F.2d 387, 388 (4th Cir.), cert. denied, 447 U.S. 923 (1980)). This reason applies with no less force when the *pro se* litigant happens to be an attorney; attorneys are not immune from the human tendency of other plaintiffs to be excessively enthusiastic and uncritical about their own causes.

Finally, as the court of appeals noted, and as several other courts have pointed out, determining the proper "fee" to award a *pro se* litigant is likely to prove an intractable task, no matter what the litigant's occupation. See, *e.g.*, *Cunningham*, 664 F.2d at 386; *Crooker* v. *United States Department of Justice*, 632 F.2d 916, 921 (1st Cir. 1980). Petitioner suggests, for example (see Pet. 29-30), that in awarding attorney's fees a court should attempt to assign a dollar value to the leisure time the *pro se* litigant has given up and the "opportunities" he has relinquished (see Pet. 29-30). It is readily apparent that any such value would be wholly speculative.

Moreover, several courts have noted the danger that potential litigants might find *pro se* FOIA litigation more profitable than the activities they must forgo to engage in such litigation, with the result that allowing attorney's fees would create a "cottage industry" in *pro se* litigation. See, *e.g.*, Pet. App. 9a; *Crooker* v. *United States Department of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980). This danger is at least as great in the case of *pro se* litigants who are attorneys. An attorney who is not working to capacity might easily decide to fill his docket by "retaining" himself to prosecute FOIA claims, in the hope that lucrative litigation will result. Congress plainly did not intend to create

such a full-employment program for attorneys when it enacted the attorney's fee provision of the FOIA.

b. All but one of the courts of appeals that have considered the issue have agreed that *pro se* litigants are not eligible for attorney's fees under the FOIA and similar provisions of other statutes, and all but one have refused to distinguish between *pro se* litigants who are attorneys and those who are not. See, *e.g.*, *Pitts* v. *Vaughn*, 679 F.2d 311 (3d Cir. 1982); *Clarkson* v. *IRS*, 678 F.2d 1368 (11th Cir. 1982); *Cunningham*, *supra*; *Crooker* v. *United States Department of Justice*, *supra*; *White* v. *Arlen Realty & Development Corp.*, *supra* (*pro se* attorney litigant denied award); *Davis* v. *Parratt*, 608 F.2d 717 (8th Cir. 1979); *Hannon* v. *Security National Bank*, 537 F.2d 327 (9th Cir. 1976); *Burke* v. *United States Department of Justice*, 559 F.2d 1182 (10th Cir. 1977), aff'g 432 F. Supp. 251 (D. Kan. 1976). See also *Kuzma* v. *United States Postal Service*, No. 83-6221 (2d Cir. Jan. 3, 1984); *Crooker* v. *United States Department of the Treasury*, *supra*.[3]

Petitioner correctly asserts that the District of Columbia Circuit permits attorney's fee awards to *pro se* litigants generally. See, *e.g.*, *Crooker* v. *United States Department of the Treasury*, 663 F.2d 140 (1980); *Cox* v. *United States Department of Justice*, 601 F.2d 1 (1979); *Holly* v. *Acree*, 72 F.R.D. 115 (D.D.C. 1976), aff'd *sub nom. Holly* v.

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[3]The Second Circuit has "held out the possibility" that attorney's fees "might" be awarded to *pro se* litigants who had to forgo an opportunity to earn their regular income in order to pursue the litigation (*Kuzma*, slip op. 823) but has held that fees would not be awarded to any persons, whatever their occupations, who made "no showing that prosecuting their lawsuits caused them to divert any of their time from income-producing activity." *Crooker*, 634 F.2d at 49; see *Kuzma*, slip op. 823.

Chasen, 569 F.2d 160 (1977) (table); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (1977). A divided panel of the Fifth Circuit has recently held that, although that circuit denies attorney's fees to *pro se* litigants generally, *pro se* litigants who are attorneys can recover attorney's fees. *Cazalas* v. *United States Department of Justice*, 709 F.2d 1051, 1055-1057 (1983).

But a conflict in the circuits existed when this Court denied certiorari in *Barrett* (see 81-5633 Br. in Opp. 7-8) and, as we noted above, the question presented by this case is even less worthy of this Court's attention than the issue that the Court declined to review in *Barrett*. There are few reported cases dealing with the question whether *pro se* litigants who are attorneys are entitled to attorney's fees under the FOIA and other statutes, and in our experience the issue seldom arises. Moreover, the amounts involved in these cases are characteristically very small.

If, as the Fifth Circuit suggested in *Cazalas* (see 709 F.2d at 1056-1057), awards are limited to those *pro se* attorney litigants who take time away from income-producing legal work in order to pursue their own FOIA claims, that will further reduce the number of cases affected by the question presented here. Indeed, as petitioner recognizes (see Pet. 22), it is well established that any litigant who has a commercial interest in the outcome of an FOIA case should not recover attorney's fees unless other factors strongly militate in favor of an award of fees (see, *e.g.*, *Blue* v. *Bureau of Prisons*, 570 F.2d 529, 533-534 (5th Cir. 1978); *Nationwide Building Maintenance, Inc.* v. *Sampson*, 559 F.2d 704, 712-716 (D.C. Cir. 1977); *Polynesian Cultural Center, Inc.*, v. *NLRB*, 600 F.2d 1327, 1330 (9th Cir. 1979); S. Rep. 93-854, at 19); since most attorneys will not divert time from a profitable law practice to engage in *pro se* litigation from which they can gain no commercial benefit, that diminishes even more the number of cases in which a *pro se* litigant who

is an attorney will actually be able to recover fees even under petitioner's approach. See, *e.g.*, *Fenster* v. *Brown*, 617 F.2d 740 (D.C. Cir. 1979) (denying fees on remand from *Cuneo* v. *Rumsfeld*, *supra*, because of attorneys' commercial interest).

For these reasons, we have not sought review of the District of Columbia Circuit's decisions in this area, and we have decided not to seek review of *Cazalas*. We note that neither the District of Columbia Circuit nor the Fifth Circuit has considered these issues en banc, and the two active Fifth Circuit judges who were members of the *Cazalas* panel disagreed on the question whether *pro se* litigants who are attorneys are eligible for fees. For these reasons, we believe that review of the issue by this Court is not warranted at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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